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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 599

UNITED STATES OF AMERICA,
Respondent-Appellee,
v.
COUNTY OF WAYNE,
Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND APPENDIX

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

TO: The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on June 14, 1967.

A. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported as of this date; a copy of the judgment and opinion of said Court is attached hereto as Appendix B. The opinion of Honorable Fred W. Kaess, District Judge for the Eastern District of Michigan, is reported in 247 F. Supp. 84; same is attached hereto as Appendix C.

B. JURISDICTION

(i) This suit was brought and original jurisdiction invoked by respondent-appellee, United States of America, Under Title 28, United States Code, Sections 1340 and 1345, and Title 26, United States Code Annotated, Section 7402(a).

(ii) Respondent-appellee, United States of America, asserting absolute priority under Section 3466 R.S., 31 USCA 191, filed an action in the United States District Court for the Eastern District of Michigan, Southern Division, on May 7, 1963, seeking to enforce its federal tax liens against a sum of money remaining in the approximate amount of $4,000.00 held by a Trustee under a trust mortgage dated April 29, 1961. The amount held by the Trustee was the balance remaining after payment of certain tax liens of the City of Detroit and the United States under the principle of "first in time; first in right", which payments were made prior to institution of this cause. The amount held by such Trustee is not sufficient to pay the various remaining tax lien liabilities of the insolvent tax debtor. Petitioner-appellant, County of Wayne, asserted

a tax lien claim against said fund for unpaid *ad valorem* personal property taxes which were prior in time to United States tax liens based on the principle of "first in time; first in right." The suit was disposed of by opinion and judgment of the United States Court of Appeals for the Sixth Circuit, Appeal No. 17,146, affirming summary judgment ordered by the Trial Judge in favor of respondent-appellee, United States of America. The United States Court of Appeals without specifically determining whether or not Michigan *ad valorem* tax liens were specific and choate so as to come within the implied judicial exception to Section 3466 R.S., 31 USCA 191, affirmed the judgment of the lower Court, citing amongst other cases, *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953), 97 L. Ed. 1071, 73 S. Ct. 701, as authority for its affirmation.

(iii) Jurisdiction of this Court to issue a writ of certiorari is conferred by C. 646, 62 Stat. 928, (28 USCA 1254(1)); C. 646, 62 Stat. 961, as amended by C. 139, Section 106, 63 Stat. 104 (28 USCA 2101(c)).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where tax debtor is insolvent, should an *ad valorem* personal property tax lien under Michigan law, which lien meets the test of choateness set forth in *U. S. v. New Britain,* 347 U.S. 81 (1954), 98 L. Ed. 520, 74 S. Ct. 367; and *U. S. v. Vermont,* 377 U.S. 351 (1964), 12 L. Ed. 2(d) 370, 84 S. Ct. 1267, and which lien is capable of being summarily enforced administratively without any assistance of the courts, considered specific, perfected and choate so as to be excepted from the application of Section 3466 R.S., notwithstanding the specificity rule set forth in *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953), 97 L. Ed. 1071, 73 S. Ct. 701?

2. Is the principle of specificity enunciated in *U. S. v. Gilbert Associates (supra)*, construing a New Hampshire tax law, applicable without exception to all the sovereign states, including Michigan, without requiring any review of the tax structure of each state to determine whether under its tax laws possession is necessary in order to perfect an *ad valorem* personal property tax lien?

D. QUESTION NOT PRESENTED FOR REVIEW

The existence of a judicial exception to the absolute priority rule in Section 3466 Revised Statutes, excluding from its purview, specific, perfected and choate liens, has not been contested by the Federal government, and is not presented herein for review.

E. STATUTES INVOLVED

Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix A attached hereto.

Michigan Statutes Annotated:

Sec. 7.1 (C.L. 1948, Sec. 211.1)
Sec. 7.81 (C.L. 1948, Sec. 211.40)
Sec. 7.83 (C.L. 1948, Sec. 211.42)
Sec. 7.87 (C.L. 1948, Sec. 211.44)
Sec. 7.91 (C.L. 1948, Sec. 211.47)

Section 3466 Revised Statutes (31 USCA 191)

F. STATEMENT OF THE CASE

This case involves interpretation of Section 3466 R.S., 31 USCA 191, under which United States is claiming priority of its tax liens which were later in date to the *ad valorem* personal property tax liens of the County of Wayne. The tax debtor was insolvent at the time the United States asserted its claim of priority. Petitioner-appellant, County of Wayne, asserts that the priority arising under Section 3466 does not override the County's specific and perfected liens for *ad valorem* personal property taxes.

The County of Wayne claimed its liens arose prior to assertion of liens by the United States. The County particularly relied on a decision of the Michigan Supreme court, specifically *In Re Ever Krisp Food Products Co.*, 307 Mich. 182, 11 N.W. 2d, 852 (1943), which in effect held that such Michigan lien is specific and perfected when nothing further need be done to perfect it. The *Ever Krisp* decision was acquiesced to in *U. S. v. O'Dell,* 61 F. Supp. 966, affirmed 160 F. 2d 304, Sixth Circuit (1945). Therefore, distribution of the funds held by Trustee should have been made on the principle of "first in time; first in right".

In this cause, the Trial Judge and the United States Court of Appeals applied the rule contained in the *Gilbert Associates* case, where it was held that the New Hampshire township was required under its tax laws to reduce to possession the property of an insolvent tax debtor in order to establish a claim of specificity. Without reviewing the statutory provisions establishing the *ad valorem* personal property tax liens under Michigan law and comparing same with the New Hampshire tax laws for similarity, the Trial Judge issued his opinion in favor of respondent-appellee, United States of America, granting summary judgment, and an order thereon was entered on November 2, 1965 (App. 48a).

Following appeal and oral argument, the Court of Appeals affirmed the order for summary judgment for the reason set forth in the opinion of Honorable Fred W. Kaess, District Judge, reported in 247 F. Supp. 84. A copy of the opinion of the United States Court of Appeals being unreported as of this date, is appended hereto as Appendix B (Rule 23 (iii)(i)).

It is the position of petitioner-appellant, County of Wayne, that under Michigan law a lien for *ad valorem* personal property taxes is specific, perfected and choate without possession since nothing further is required to be done under its tax laws to perfect the lien and such lien is therefore impliedly excepted from application of Section 3466 R.S. This being so, competing liens of the Federal government and the County of Wayne should be determined on the basis of the principle of "first in time; first in right" as propounded by Chief Justice Marshall in *Scott v. Rankin,* 12 Wheat. 177, 179.

G. REASONS FOR GRANTING WRIT

1. Both the Trial Judge and the United States Court of Appeals without reviewing the statutory provisions establishing the *ad valorem* property tax liens under Michigan law and without comparing same with the New Hampshire tax laws for similarity, applied the standard of specificity contained in the *Gilbert Associates* case.

The Trial Judge and the Court of Appeals should have reviewed the respective tax structures of both New Hampshire and Michigan in order to determine whether any similarity exists. If a comparison were made, the question of whether the standard of specificity as appears in the *Gilbert Associates* case applies to Michigan would have been resolved in the negative.

Briefly, under New Hampshire law, (at the time of the *Gilbert Associates* case) the township assessed certain machinery to taxpayer as realty and maintained that such assessment had the force of a judgment entitled to recognition and protection under Section 3672 I.R.C. of 1939. It is clear that the taxing units in New Hampshire under its tax laws did not have any lien for taxes assessed on personal property; that only the person in possession of the personalty and liable for taxes assessed thereon, could acquire a lien for the taxes paid by him, Sections 72:17, 72:34, 73:12, 73:25, 1955 N.H. Rev. S.A., formerly Sections 73:18, 74:12, 74:25 and 74:4, respectively.

Since under New Hampshire law, taxing authorities did not have any lien against the personal property assessed, the significance of the specificity standard under the *Gilbert Associates* case becomes clear, namely, that where no lien exists by statute, a lien may nevertheless be acquired through possession of the debtor's property. This the New Hampshire township had not done.

However, in Michigan, under its tax laws, a tax assessed against personal property becomes a *lien* on a specific day (December 1 for county taxes) and *remains so* until paid, Section 7.81 MSA. Not only does the lien remain until fully paid, but Michigan law authorizes seizure and sale of tax debtor's property administratively without judicial proceedings or assistance, Section 7.91 MSA.

It is respectfully submitted that since Michigan tax laws differ substantially with New Hampshire laws, the *Gilbert Associates* case should not be accepted as authority for striking down the County's *ad valorem* personal property tax lien as being inchoate without seizure. It is further submitted that in order to use a standard of specificity it would be necessary that all taxing authorities throughout the United States have a standard uniform tax structure.

2. Due to the independent sovereignty of the various states and their individual tax structures, the question of whether the *Gilbert Associates* case applies to all local taxing units without regard to their tax structure and without regard to the fact that local legislative enactments may not require possession for the perfection of *ad valorem* tax liens, is a matter requiring clarification by this Court.

3. The basic rule of fair play requires the use of the principle of "first in time; first in right" with respect to competing Federal and local tax lien claims. Any rule to the contrary would create situations inequitable to and infringing upon the rights of the local units of government to levy and collect its taxes. Harmony in the co-existence of local and Federal governments is beneficial to each and should always be encouraged whenever possible, thereby giving continued, meaningful significance to "States" in the United States.

The Trial Judge, even though believing that the principle of "first in time; first in right" would be more equitable (47a), nevertheless held that the *Gilbert Associates* case controlled in determining the choateness of Wayne County's personal property *ad valorem* tax lien. If it were not for the *Gilbert Associates* case, it appears that the Trial Judge would have agreed with the language of Mr. Justice Yeates in *State v. Nicholls,* 4 Yeates 251 (1805), writ of error dismissed, 4 Wheat. 311, where Justice Yeates of the Pennsylvania Supreme Court, in speaking for the Court, stated at page 259:

> "* * * that congress have the *concurrent* right of passing laws to protect the interest of the union, as to debts due to the government of the *United States* arising from the public revenue; but in so

doing, they cannot detract from the uncontrollable power of individual states to raise their own revenue, nor infringe on, or derogate from the sovereignty of any independent state * * *.

"* * * The rights of the general government to priority of payment, and the rights of individual states, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This only can be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured."

and would have applied the principle of "first in time; first in right" which has been the rule of law long established in Michigan by the *In Re Ever Krisp Food Products Co.* case, 307 Mich. 182, (1943).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 31, 1967.